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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 296

HUBERT C. REYNOLDS, suing on behalf of himself and others having common rights and interests,

Petitioner,

v.

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF DADE, STATE OF FLORIDA, and JAMES T. WILSON *Respondents*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I.

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered April 23, 1945 (pp. 426 to 434), and was reported as *Reynolds* v. *Board,* 148 Fed. 2d 754.

II.

Statement of Jurisdiction

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the Petition and in the interest of brevity, is adopted as a part of this brief.

III.

Statement of the Case

A statement of the case is contained in the Petition.

We deem it well, however, for the convenience of the Court to give this chronological sequence as disclosed by the record:

In the school year 1941-1942 there were 263 negro and 1200 odd white teachers and principals employed by the Board of Public Instruction of Dade County, the agency of the State of Florida for the administration of public free schools of that county. The negro teachers and principals were members of the "Dade County Negro Teachers' Association," an unincorporated organization.

For the school year 1941-1942 teachers and principals were being paid salaries provided for under a schedule which had been adopted on December 11, 1940 (Pet. Ex. 2). This schedule provided separate and different salaries; those for the whites being higher than those for negroes, color or race determining the differential.*

On November 4, 1941, the said Negro association presented to the said Board of Public Instruction a letter embodying a resolution which had been adopted by its members directing attention to the illegality of the practice of making race or color the sole basis of compensation. Accompanying this letter was a petition for equalization of salaries signed by all but one of its members (Pet. Exhibit 1 of June 23, 1943).

The day after the presentation of the said letter and petition the Board abolished the existing schedule and directed the defendant Wilson who, although not a member of the Board, is by law its secretary and executive

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* The exhibits referred to in this brief are the original exhibits forwarded to this Court by order of the District Court; they were a part of the record in the Circuit Court of Appeals and were returned to the District Court.

officer, to prepare a schedule by which teachers and principals in the said schools would be paid according to their individual worth.

Three weeks later, Nov. 26, 1941, the Superintendent presented to the Board (Pet. ex. 3) a schedule providing for classification and rating on certain subjects by a committee composed of himself, and members of his staff, stating that all contract teachers had already been rated under this schedule. White teachers only were under contract at that time (p. 336). This schedule proved "unworkable" (pp. 147, 172, 225, 282), and on April 29, 1942, the Board adopted a new schedule (Rec. p. 19) as an amendment.

All the schedules were prepared by the Superintendent and the administrative staff to which he referred as "my personnel" (p. 214). And he also named himself and this personnel as a rating committee to rate and classify the teaching personnel of the schools, all of them being former white classroom teachers of Dade County (pp. 216-220).

In the meantime, there being no substantial change in the lot of the colored teacher personnel under the November schedule, this action was begun on February 17, 1942, by petitioner, who was President of the Negro Association, on behalf of himself and others with common rights and interests. The defendants made a motion to dismiss the complaint and the white teachers moved for leave to intervene as defendants. Both these motions were dismissed by Honorable Louie Strum, District Judge, on March 26, 1942 (p. 416).

On May 12, 1942 the defendants filed an answer, of which the following is a brief summary:

It admitted most of the allegations of the complaint but (1) denied that the services performed by the negroes is essentially the same as that by the whites; (2) denied that they pursued the "custom, policy and usage" complained of solely because of race or color; (3) denied the jurisdiction of the Court under the Judi-

cial Code and (4) denied that this is a suit in equity arising under the Constitution and laws of the United States (pp. 7-17).

On Feb. 11, 1943, the defendant superintendent was examined by plaintiff's attorney in a deposition taken before a notary public (p. 243). This deposition was offered in evidence but was excluded upon objection of defendants that it had not been submitted to the witness for review and correction (p. 83). Six days after the taking of these depositions and more than nine months after the original answer had been filed in which the defendants had alleged that they had impartially and without discrimination, because of race or color, rated all teaching personnel, white as well as negro, the defendants filed seven additional defenses in which, briefly stated, they alleged that the difference in salary was occasioned by the economic conditions and needs of the two races (pp. 42-52). And, incidentally, by the law of supply and demand.

The case came on to trial on June 23, 1943, but was continued after five exhibits of the plaintiff had been admitted in evidence. (Pet. Exs. 1, 2, 3, 4 and 5 of June 23, 1943).

On Nov. 12, 1943, the defendant filed a list of all salaries paid to the teacher personnel under the protested and succeeding schedules. The trial was resumed on Dec. 6, 1943. Petitioner offered in evidence the said official list of salaries, it being admitted as Petitioner's Ex. No. 1 of Dec. 6, 1943. Petitioner then offered the depositions above referred to, which, after first being admitted, were rejected for the reasons stated (p. 83).

The plaintiff then rested.

IV.

Specifications of Errors

The Circuit Court of Appeals erred in the following respects:

In affirming the order of the District Court.

V.

Argument in Support of Petition

No question is presented of the jurisdiction of the Court, nor is there any question as to the right to the relief sought — declaratory judgment and injunction (p. 5).

Question Presented

But one question is presented: Does the record show that the defendants discriminated against the petitioner and those similarly situated, solely because of race or color?

This is not the first case of its kind to come before the Courts. In the case of *Vernon McDaniel, on behalf of himself and others similarly situated,* v. *The Board of Public Instruction for the County of Escambia, a body corporate, and A. S. Edwards, Supt.,* U. S. Dist. Ct. Northern District of Florida, which was not appealed and, so far as we can find, is unreported, Judge Augustine V. Long said:

> "7. All teachers and principals in Florida, including plaintiff and others similarly situated are required to hold teaching certificates in full force, in accordance with the Rules of Certification established by the State Board of Education (Florida Compiled General Laws, Section 630). Negro and white teachers and principals alike must meet the same requirements to receive teachers' certificates." And
>
> "This complaint is in most respects similar to the complaint filed in the case of *Alston* v. *School Board of the City of Norfolk,* and in passing upon a similar motion to dismiss, the Court of Appeals of the Fourth Circuit, speaking through Circuit Judge Parker, said:
>
> " 'That an unconstitutional discrimination is set forth in these paragraphs hardly admits of argu-

> ment. The allegation is that the State, in paying for public service of the same kind and character to men and women equally qualified according to standards which the State itself prescribes, arbitrarily pays less to negroes than to white persons. This is as clear a discrimination on the ground of race as could well be imagined and falls squarely within the inhibition of both the due process and equal protection clauses of the Fourteenth Amendment.' *Alston* v. *School Board of the City of Norfolk,* 112 Fed. 2d, 992, text 995."

A petition for writ of certiorari to review the Alston decision was denied by this Court (311 U. S. 693, 85 Law Ed. 448).

Again quoting Judge Long:

> "In this case there is no statutory schedule, but there is a salary schedule established by administrative ruling of an administrative agency of the state, and the prohibitions of the Fourteenth Amendment certainly apply to such agencies. 'The inhibitions contained in the Fourteenth Amendment means that no agency of the State nor of the officials or agents by whom its powers are exerted shall deny to any person the equal protection of the laws. Whoever by virtue of public position under a State Government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of laws, violates the constitutional inhibition; and as he acts in the name and for the State and is clothed by the State's power, his act is that of the State.' *Ex parte Virginia,* 100 U. S. 339."

The District Judge held (pp. 404, 406) that a substantial differential in salaries paid to the blacks, as compared to those paid to the whites, existed at the time of trial, but he said that this difference "resulted from the exercise of judgment and discretion of the defendants as public officials in evaluating the worth and effectiveness of the respective groups."

Schedule One Thing, Its Application Another

Even were it admitted that on their face the new schedules provided for an impartial system of rating teacher personnel we insist that the results as shown by the tabulation of salaries (Pet. Ex. 1 of December 6, 1943) prepared and certified by the Superintendent himself, together with their own testimony as to the preparation of the schedules, personnel of the so-called rating committee, the manner of rating as well as the figures themselves, disclose the sole purpose of the defendants to reach the same discriminatory differential in salaries between the white and the negro as under the acknowledged unconstitutional schedule and that their every act from the day of the negro protest to the day of the trial revealed their purpose—under a series of subterfuges—to give a superficial appearance of obeying the constitutional inhibitions, while actually ignoring them; or, as this Court said in *Smith* v. *Texas,* 311 U. S. 128-132, 85 Law Ed. 84:

> "The fact that the written words of a State's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not promised."

That case concludes with this significant and apt statement:

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

There is a dearth of examples of discrimination of the kind involved here. However, the principles stated in the Smith case, *supra,* are controlling.

Method of Rating Unfair to Negroes

As a matter of fact the methods of rating which the so-called rating committee devised and used as described